IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1587

ZINNAMON ASSOCIATES, *et al.*, etc.,

Respondents,

v.

RALPH K. SWAFFORD,

Petitioner.

Appeal from the United States District Court
for the Western District of Texas at El Paso

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Respondents, ZINNAMON ASSOCIATES, respectfully submit that the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on December 21, 1973, should be denied.

OPINIONS BELOW

After a series of hearings and a full trial in the United States District Court for the Western District of Texas at El Paso, judgment was rendered in favor of the Respondents. Petitioner appealed to the United States Court of Appeals for the Fifth Circuit. The unpublished opinion (487 F.2d 1400), was a *per curiam* affirmance of the judgment below. Subsequently, at the request of Petitioner, a written opinion was rendered by the United States Court of Appeals for the Fifth Circuit on January 31, 1974, and published at 488 F.2d 863 (Appendix C to Petition, pp. 4a-6a).

As evidence of Petitioner's lack of good faith in prosecuting his appellate remedies, his counsel did not even bother to appear for argument of that appeal, in spite of his written acknowledgement to the Court that he had received notice of the date of said hearing. The instant Petition is a further unjustifiable effort on the part of Petitioner to delay compulsory compliance with the Injunctive Order issued by the Trial Court, since the Trial Court has refused to enforce the same until all appeals have been exhausted.

QUESTION PRESENTED

Has Petitioner been denied due process by electing to proceed with the conclusion of testimony, in the absence of the Trial Judge, and in the nature of a deposition which would be read and considered before Judgment was entered?

STATEMENT OF FACTS

On January 20, 1971, this action was instituted by the filing of a Complaint For Temporary Restraining Order, Preliminary and Permanent Injunctions and Other Relief. On February 10, 1971, after full hearing (on January 26, 1971), a Preliminary Injunction was entered and trial was scheduled on the merits for March 1, 1971. A subsequent pretrial hearing was held in this case on March 9, 1971, and trial was delayed until August 14, 1972. On that latter date all parties appeared and testified in full. At the conclusion of that trial Defendant, recognizing that his position was precarious, at best, begged the Court for a continuance during which he would seek to secure a witness who was a citizen and resident of Mexico, as well as certain documentary evidence he claimed was physically located in Mexico City and would prove some of his unsupported contentions. The Court advised Defendant that he would be given one week within which to secure such testimony and documentary evidence and would be afforded one last opportunity to attempt to persuade the Court that his contentions were valid. All parties were instructed to appear again on August 21, 1972, for Defendant's final presentation of evidence and Plaintiffs were further instructed to prepare Findings of Fact and Conclusions of Law consistent with the Court's previous oral expressions.

On August 21, 1972, all parties appeared and Defendant produced one witness, but no documentary evidence. The Trial Court sat patiently through Defendant's final presentation of testimony and was obviously not persuaded to alter its findings thereby. Having no way to anticipate the Court's reaction to this additional direct testimony, Counsel for Plaintiffs wished to proceed with cross-examination of Defendant's last witness as well as to offer rebuttal testimony.

The Trial Court, in order to accommodate Defendant in this one-week continuance, had interrupted a jury trial which was then in progress and did not feel that that jury trial could be further delayed in order to complete prolonged cross-examination of Defendant's Mexican witness. At that point, the Court offered counsel for both sides an opportunity to elect to recess this case once again, or, in the alternative, to proceed with cross-examination in the nature of a deposition which would be transcribed, read and considered before final determination of this action was made. Pertinent portions of the colloquy between Court and counsel are as follows:

[For Defendant-Petitioner – Mr. Chagra
For Plaintiffs-Respondents – Mr. Kerman]

App. 342. THE COURT: Just a minute, gentlemen. I have a jury case going on downstairs. Do you want to take a recess or do you want to get a Court Reporter and go and take this testimony in detail, because I know you are going to have a prolonged examination.

App. 343. MR. KERMAN: Yes, Your Honor, I think there may be some required Court rulings on evidence during the testimony, though.

THE COURT: Well, you can go ahead and answer so far as you know and then I will pass on whether it should be admitted.

App. 350. THE COURT: All right.

I want you to understand that you will not be objecting on the grounds that it is immaterial or irrelevant. I will pass on that later.

MR. CHAGRA: Your Honor, for the sake of time, may we at this time not make objections and after it is typed up make objections at that time?

THE COURT: That is what I am saying.

[107] MR. CHAGRA: In other words I don't have to object to the question if I think it is improper, I don't waive it.

THE COURT: That's right, you don't waive it.

MR. KERMAN: Thank you, Your Honor.

As can be seen from the foregoing, Counsel for Petitioner (Mr. Chagra) was perfectly satisfied with the manner in which these proceedings were to be conducted, and made no objection whatever to the same. On January 31, 1973, in open court, the Trial Judge reviewed his proposed Judgment in this action and afforded both sides an opportunity to discuss their views on the testimony taken by deposition. This proceeding appears in the record as follows:

[For Plaintiffs-Respondents – Mr. Galatzan]

JANUARY 31, 1973

App. 353. THE COURT: All right, Judge Galatzan have you given Mr. Chagra a copy of the proposed judgment?

MR. GALATZAN: I haven't, Your Honor. I will hand him one.

THE COURT: If you have another copy, give one to [110] Mr. Swafford so he can be reading it too.

> Now I will hear discussions on this and also if you care to review that testimony taken by the depositions, Mr. Chagra.
>
> Do you wish to state your position about this first, Judge Galatzan? You can do it briefly and then let's hear from Mr. Chagra.
>
> MR. GALATZAN: We have nothing, Your Honor, at this time other than what the order provides.
>
> THE COURT: Mr. Chagra? You have looked at it. Give me your views about this.
>
> App. 354. MR. CHAGRA: Your Honor, I have not received the deposition yet but I am aware of what is in it.
>
> THE COURT: Yes, sir. I am aware of the testimony.

Not only was this testimony taken by agreement, but no Judgment was entered until after the Trial Judge had read a transcript of the same and given counsel for both sides full opportunity to discuss that testimony in open court. At no time during either the colloquy, in which procedures were established for the taking of that testimony, or during the hearing on January 31, 1973, did Petitioner's Counsel indicate any displeasure with the procedure which had been utilized with his consent. It is only now, when Petitioner finds himself dissatisfied with the Judgment rendered, that he claims denial of due process.

ARGUMENT

Having failed to object at the trial level, Petitioner should be estopped from raising the question of denial of due process. The United States Court of Appeals, Fifth Circuit, in its written opinion in this case, 488 F.2d 863, specifically ruled upon this issue. At page 864, that Court stated:

> "In the absence of exceptional circumstances where a miscarriage of justice would result, a condition not present here, questions that were not presented to or passed on by the trial court will not be considered on appeal. Wisconsin Barge Line, Inc. v. Coastal Marine Transport, Inc., 414 F.2d 872 (5th Cir., 1969); B & G Electric Co. v. G. E. Bass & Co., 252 F.2d 698 (5th Cir., 1958). *See also* J. F. White Contracting Co. v. New England Tank Industries, 393 F.2d 449 (1st Cir., 1968). D. H. Overmyer Co. v. Loflin, 440 F.2d 1213 (5th Cir., 1971)."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should deny the Petition For Writ of Certiorari sought in this action.

Respectfully submitted,

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